

BI-ANNUAL REPORT FOR FISCAL YEAR 2007

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Kevin E. Deary
Executive Director
Phone (401) 228-6989
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David N. Cicilline
Mayor

City of Providence, RI PROVIDENCE EXTERNAL REVIEW AUTHORITY

June 30, 2007

Officers
Chair
Luz Bravo-Gleicher

Honorable Mayor and Members of the City Council
25 Dorrance Street
Providence RI 02903

Vice Chair
Dr. Arthur Jones

Dear Mayor Cicilline and Members of the City Council,

Treasurer
John Hearn

Enclosed is the Providence External Review Authority (PERA) 2007 Bi-Annual report submitted for your review. This report focuses on the statistical analysis of complaint data and the 6 months events.

Secretary
Kohei Ishihara

I would like to acknowledge Mayor Cicilline, President Peter Mancini and the City Council for your continued support for the Providence External Review Authority and the civilian oversight process. I want to also again thank the members of the City's Law Department who have responded to our questions and needs under the leadership of Joseph Fernandez. I want to thank the members of my staff at PERA and their contributions to the civilian oversight process this past year. I want to acknowledge the efforts of the PERA Board for their tireless efforts in support of the civilian oversight process. I would especially like to thank Myrth York, Mary K. Harris, and Paul Caswell who served both as Chairperson as well as board member for their tireless efforts over the years to bring PERA to where it is today. Without their efforts and board members like them the civilian oversight process would still be on the drawing board. I would also like to recognize the efforts of the Providence Police Department, particularly Inspector Francisco Colon and the Internal Investigations and Inspection Division, for providing their ongoing cooperation.

Board Members
Stanley A. Bleecker
Kenneth Brown
Artin Coloian
Gladys Gould
Mary Jones
Rochelle Lee
David Marshall
Phillip McKendall
Ines Merchan
Brother Everett Muhammad
Frederick J. Price
Reverend Mynor Vargas

Respectfully submitted,

Kevin E. Deary
Executive Director

Luz Bravo-Gleicher
Chairperson

Kevin E. Deary
Executive Director
Phone (401) 228-6989
Fax (401) 228-6998



David N. Cicilline
Mayor

City of Providence, RI

PROVIDENCE EXTERNAL REVIEW AUTHORITY

550 Broad Street
Providence, RI 02907

“The Purpose and the Mission of PERA”

The purpose of the Providence External Review Authority (PERA) is to investigate allegations of misconduct on the part of officer(s) of the Providence Police Department, to make findings of fact and to make findings of fact and to make recommendations of potential disciplinary action to the Chief of Police.

PERA was established in 2002 by Providence City Ordinance No. 614 (Chapter 2002-39), to provide for a system of Civilian Oversight over the Providence Police Department. PERA has the mission and the authority to investigate and conduct hearing concerning allegations of misconduct on the part of sworn officers of the Providence Police Department.

If you believe that you have been the victim of misconduct committed by a sworn officer of the Providence Police Department, you have the right to report the incident to PERA. You may contact PERA at the address and telephone number provided above or you can email (PERA) at Pera@providenceri.com

PERA BOARD MEMBERS

Officers:

Luz Bravo-Gleicher, Chair:

Communication from former Councilman David Segal, dated April 25, 2006, informing the City Clerk that he is this day re-appointing Ms. Luz Bravo-Gleicher to the Providence External Review Authority (PERA), for a term of three (3) years. Her term expires in March 2009.

Dr. Arthur Jones, Vice Chair:

Communication dated June, 2007, informing the Honorable Members of the City Council that pursuant to Sections 302(b) and 1103 of the Providence Home Rule Charter of 1980, as amended, he is this day appointing Dr. Arthur Jones as a member of the Providence External Review Authority for a term to expire in June 2010.

Dr. Arthur C. Jones is an Assistant Professor of Legal Studies at Johnson & Wales University, Providence RI where he has been on faculty since 2001. His teaching and research have been in law enforcement, corrections and parole. Dr. Jones received his Ph.D. from The Union Institute Cincinnati Ohio (1999) and has served as a social worker and administrator in corrections for 32 years. He retired from the New Jersey Department of Corrections and Parole after 28 years of service. During his career in New Jersey he served 12 years on the New Jersey State Parole Board. Six (6) years on the Juvenile Panel and six (6) years on the Adult Panel. Dr. Jones also served eight years on the Police Training Commission (PTC). He worked as an Adjunct Professor at Rutgers University, Seton Hall University and several community colleges. Shortly after retiring in 2001, he moved to Rhode Island. He is currently a member of Rhode Island State Parole. Governor Almond appointed him to the Rhode Island Parole Board in June 2002. The Mayor David Cicilline appointed him to the Providence Police External Review Authority (PERA). Dr. Jones is a criminal justice consultant, trainer, educator and practitioner. He is a recognized proponent of the community-based approach to managing the needs of the criminal justice system. He is interested in working with criminal justice planners and law enforcement agencies to improve, police and community relations. He has been active in many professional organizations over the last 32 years. He is a member of numerous criminal justice professional organizations, the Academy of Criminal Justice Sciences (ACJS), Northeastern Association of Criminal Justice Sciences (NEACJS), American Correctional Association (ACA), Association of Paroling Authorities International (APAI) American Probation and Parole Association (APPI) The American Society of Criminologist and is President of the Rhode Island Association of Criminal Justice Sciences (RIACJS).

John Hearn, Treasurer:

Communication from Councilman Patrick Butler, dated January, 2005, informing the City Clerk that he is this day re-appointing John Hearn to the Providence External Review Authority (PERA), for a three (3) year term to expire in January, 2008.

John Hearn is currently a Providence resident. His parents are Irish immigrants who moved to Providence in 1946. His wife's grand parents are Italian immigrants who moved to Providence in the 1920's. He married his high school sweetheart, and they have two children, Amanda and Elliot. Mr. Hearn attended grade school at St. Raymond's. From there he attended Our Lady of Providence, and graduated from Hope High School in Providence. It was nine years ago that he had an opportunity to take a job in management for a large tile manufacture, Daltille, and he did. Today he handles commercial sales for greater Boston, Southeastern MA and RI. He is on the board of governors at Triggs Golf Club in Providence, and he is on a fund raising committee for Save Sight Rhode Island. As far as his outlook on the future of PERA, he is confident.

Kohei Ishihara, Secretary:

Communication from Councilman Miguel Luna dated June 29, 2005, informing the City Clerk that he is this day re-appointing Kohei Ishihara to the Providence External Review Authority (PERA), for a 3-year term to expire in June 2008.

Kohei D. Ishihara grew up in Rockville, Maryland where he first started analyzing race and oppression through his peer leadership work at St. Andrews Episcopal High School. Kohei moved to Providence, Rhode Island in the fall of 1998 to attend Brown University. Kohei then made the important decision to stay in Providence, RI and work to develop and empower the Southeast Asian community. Kohei is the co-founder and Executive Director of the Providence Youth Student Movement (PrYSM), a grassroots Southeast Asian youth organization committed to anti-racist organizing, youth empowerment, and community development (visit www.prysm.us). He is a founding PERA board member who joined PERA because he wanted to find a way to honor the community struggle for police accountability that started years before the death of Sgt. Cornell Young, Jr. "This country and nation is responding to terrorism by taking away the rights of ordinary citizens, by denigrating the lives of poor and struggling immigrants, and by building a police state where violence is institutionally enforced to preserve the American status quo." He feels that he is on PERA to enforce justice against police officers who have abused their power, or have used any size, shape, or form of illegal profiling. He sees PERA as strengthening the relationship between the community and the police, and preserving the respect and sanctity of both. In the future, he envision the Providence Police Department and PERA working harmoniously to create alternative forms of policing, and working to build stronger, healthier, and safer communities.

Board Members:

Stanley A. Bleecker:

Communication from Councilwoman Rita M. Williams, dated March 8, 2006, informing the City Clerk that she is this day re-appointing Mr. Stanley Bleecker to the Providence External Review Authority (PERA), for a term to expire in March, 2009.

He was born in Providence, Rhode Island. He has a son and daughter and three grandchildren. His primary and secondary education was within the Providence school system including graduation from Classical High School. He is a graduate of Brown University with a Bachelor of Science in Electrical Engineering and obtained a law degree from Boston University. Upon graduation from college he worked for three years at the Westinghouse Electric Company, a company that no longer exists. Upon graduation from law school he went to work for the Providence Law Firm of Tillinghast, Collins and Graham for twenty-seven years. For most of those years he was a partner. He currently is a solo practitioner with an office in the city of Providence. Over the years he has held a number of positions in community and charitable organizations including President of the Board of Directors of Alias Stage, board member of Brown University, Rhode Island School of Design, Hillel, Board Member and Vice President of Rhode Island Community Mediation Center. He finds that working for PERA as a Board Member to be extremely worthwhile.

Kenneth Brown:

Communication from Councilman Kevin Jackson, dated June 1, 2006, informing the City Clerk that he is this day re-appointing Mr. Kenneth Brown, to the Providence External Review Authority (PERA), for a term to expire in June 2009.

Artin Coloian:

Communication from Council President John Lombardi dated October 24, 2006, informing the City Clerk that he is this day appointing Mr. Artin Coloian as a member of the Providence External Review Authority (PERA) to serve the remaining term of the Reverend James Cook that expires in March 2008.

Mary Jones

Communications from Councilman Terrence Hassett, dated July 27, 2006, informing the City Clerk that he is this day appointing Ms. Mary Jones to the Providence External Review Authority (PERA), for a three (3) year term to expire in July 2009.

Ms. Jones is a lifelong resident of Rhode Island and has been active in community affairs for many years.

Rochelle Lee

Communications from Thomas P. Whitten, Chairman, Providence Human Relations Commission, dated August 17, 2006, informing the City Clerk that he is this day appointing Rochelle Lee to the Providence External Review Authority (PERA), for a three (3) year term to expire in August 2009.

Ms. Lee has been a lifelong resident of Rhode Island and has been very active in community affairs in South Providence. Ms. Lee is an urban planner with specialized expertise in residential development financing and management. She has worked with non-profit and community-based sponsors to develop more than \$20 million of affordable housing in Rhode Island and Massachusetts. For several years, Ms. Lee managed the Local Initiatives Support Corporation (LISC) program to improve capacity of community development corporations engaged in revitalizing urban neighborhoods. She was Asset Management Specialist for the National Equity Fund's \$100 million investment portfolio throughout New England, managing related equity investments in residential property. She is a board member of several community-based organizations including the Mt. Hope Neighborhood Land Trust, the Elmwood Community Center, Good News Housing, and MUSIC ONE. Ms. Lee is the current board president of the RI chapter of the Association of Fundraising Professionals. She is a Wellesley College alumna and holds a B.A. degree from the University of Massachusetts, (magna cum laude), a Masters of Art from Boston University and a Masters of City Planning from the School of Architecture at the Massachusetts Institute of Technology. She was a recipient of a HUD Fellowship to attend MIT and through her Master's Degree program at Boston University; she studied at the University of West Indies completing graduate teaching practicum-training teachers in Kingston, Jamaica.

David A. Marshall

Communications from Councilman John J. Iglizzi dated July 18, 2005, informing the City Clerk that he is this day appointing David A. Marshall to the Providence External Review Authority (PERA), for a three (3) year term to expire in July 2008.

Mr. Marshall is 47 years of age, married with (2) children- Bryan (18) and Jennifer (23). He is employed for 31 years with the Providence College Security Department as a Sergeant on the 11pm-7am shifts. He commands approximately 22 officers. He attended LaSalle Academy, graduating in 1975, went to Roger Williams College and CCRI and is now attending Providence College SCE. He is very active in the neighborhood and well respected by many. He entered the political arena with an unsuccessful bid for the 2002 City Council. He is interested in PERA because he believe that public voices should have a chance for fair actions and it should be known that everyone should be at least heard with interest and understanding. A fair judgment should be always made for BOTH PARTIES in all cases.

Frederick J. Price:

Communication from Councilwoman Josephine DiRuzzo, dated November 10, 2006, Informing the City Clerk that she is this day appointing Mr. Frederick James Price as a member of the Providence External Review Authority (PERA) term to expire in March 2008. (Mr. Price will replace Oscar Vargas, who was appointed March 14, 2005, who has been removed from the committee, for the remainder of the term).

Mr. Price is a retired prison guard having been employed at the Adult Correctional Institution. He is a life long Rhode Island resident.

Gladys Gould:

Communication from Councilman Luis A. Aponte dated April 26, 2007, informing the City Clerk that he is this day appointing Gladys Gould as a member of the Providence External Review Authority, for a three (3) year term to expire in July 2009.

Phillip McKendall:

Communication from Councilman Peter Mancini dated June 2005, informing the City Clerk that he is this day appointing Phillip McKendall as a member of the Providence External Review Authority, for a three (3) year term to expire in June 2008.

Ines Merchan:

Communication from Councilwoman Balbina A. Young dated May 16, 2007, informing the City Clerk that she is this day appointing Ms. Ines Merchan as a member of the Providence External Review Authority (PERA) to expire in March 2008. (Ines Merchan will replace Mary K. Harris, who was appointed March 14, 2005, who has resigned from her three (3) year term).

Ines Merchan lives right in the community on Comstock Street. She is the mother of three teenagers. Ines has just recently graduated from URI. She has been living in Providence for at least 20 years. She has worked with non-profit every since she has had her children. Currently she works at the RI Foundation. She also has worked at DARE (Direct Action for Rights and Equality) for approximately 5 years.

Brother Everett Gomes-Muhammad:

Communication from Councilman John J. Lombardi dated April 9, 2007, informing the City Clerk that he is this day appointing Everett Gomes-Muhammad to the Providence External Review Authority (PERA), for a three (3) year term to expire in July of 2010.

Reverend Mynor Vargas:

Communication dated March 6, 2007, informing the Honorable Members of the City Council that pursuant to Sections 302(b) and 1103 of the Providence Home Rule Charter of 1980, as amended, he is this day appointing Reverend Mynor Vargas as a member of the Providence External Review Authority for a term to expire in March 2010.

Reverend Vargas will be replacing Morris Weintraub whose term expired in May 2006.

STAFF

Mr. Kevin E. Deary, Executive Director

He was appointed Acting Executive Director by the PERA Board of Directors on March 27, 2006. Mr. Deary is a retired FBI Agent with 25 years of service to the United States. He has served in numerous communities across America to include Minneapolis, New Mexico, Miami and Rhode Island. He has conducted numerous federal civil rights violation cases over the years. Mr. Deary has worked in the insurance industry investigating fraud, the tobacco litigation field and the private investigations field to include sensitive government background investigations since his federal retirement in 1994. Due to his 12 years of residency in Rhode Island he is familiar with the ethnic makeup of the various communities. Mr. Deary in his short time has brought PERA through the lawsuit by the FOP, developed solid working relationships with the Attorney General's Office, the Command Staff of the Providence Police Department, especially the Internal Investigations and Inspection Division, and the Rhode Island Chiefs of Police Association, the Roundtable of the Urban League, as well as community organizations throughout Providence. Mr. Deary is developing a Manual of Operations for PERA so its important work can continue on in an organized manner. Mr. Deary has supervised the staff at PERA so that the daily operations move smoothly. He has met with the Mayor and his staff, City Council members, numerous department heads and employees in order that PERA attain its goals within the city. He has assisted in training PERA Board Members as to their expected duties. He continues to meet with community support members and develop new advocates throughout the Rhode Island network.

Mr. Kevin E. Deary was officially appointed Executive Director April 11, 2007.

Mr. Roderick J. Kennedy, Case Investigator

He was appointed as the Investigator under Mr. Deary in May 2006. He brings 25 years of experience with the FBI to PERA. Mr. Kennedy investigated numerous federal civil rights cases in Rhode Island and Massachusetts during his career. Mr. Kennedy is a native of Rhode Island having been raised in Providence and attended Providence public schools and Providence College. He was a US Army helicopter pilot attaining the rank of Captain. Since his retirement from the FBI he has been involved in numerous investigations in Massachusetts and Rhode Island. His father still resides in Rhode Island. In addition Mr. Kennedy brings a strong knowledge of computers and data collection systems to PERA. He has been heavily involved with the IT department of the city in upgrading PERA's IT network. Mr. Kennedy is also involved in the development of a Manual of Operations for PERA so that PERA's investigative staff will have guidelines to follow.

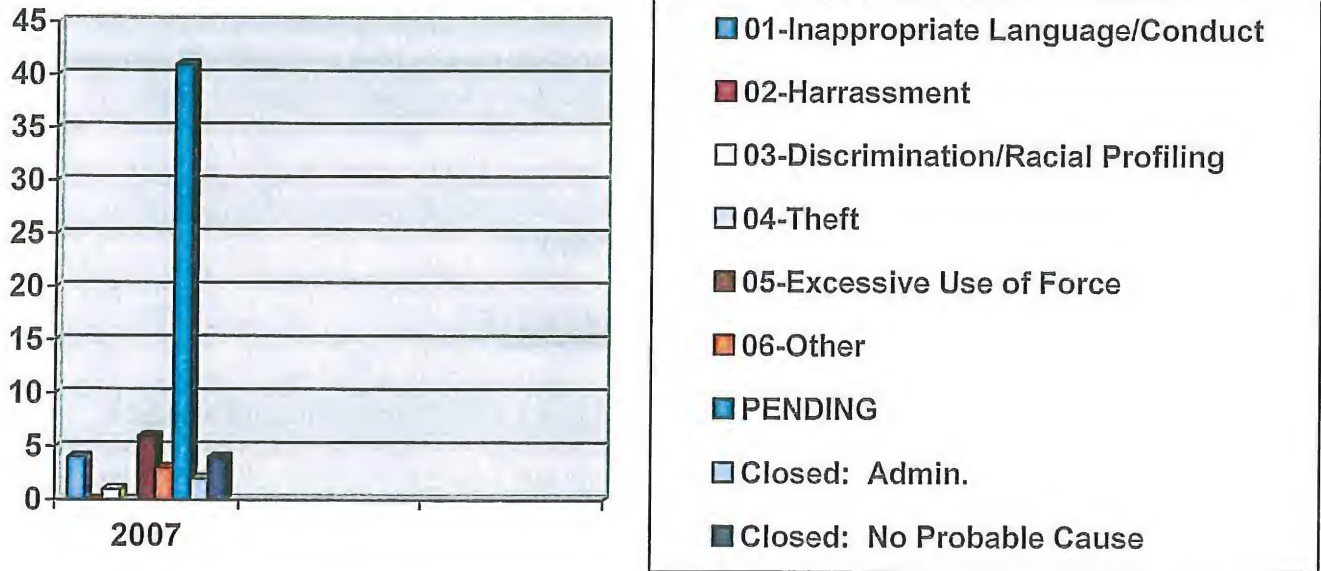
Mr. Roderick J. Kennedy was officially appointed Full-time Case Investigator March 7, 2007.

Ms. Kathy Gee, Confidential Secretary

She was appointed in December 2004, as the Confidential Secretary of PERA. She reports directly to the Executive Director, which investigates allegations of police misconduct in the City of Providence. Ms. Gee assist the Executive Director and his investigators in handling all duties of the PERA office as they pertain to emergency and non-emergency situations and complaints. She is not only the Confidential Secretary but also the PERA point of contact for the community. She is a licensed Notary Public, instrumental in developing the PERA website, has produced PERA informational pamphlets and brochures, and runs the overall daily operations of the office with the daily dealings with departments at City Hall. She is also responsible for performance of complex and difficult, duties concerning highly confidential law enforcement matters. She along with Mr. Kennedy has been developing a data system for PERA and a Manual of Operations guideline. Ms. Gee in her short tenure has developed close working relationships with strategic members of departments at City Hall, which offer expertise to PERA. Ms. Gee accepted the position at PERA because she believes in the mission and purpose of PERA, and is willing to offer her support as well as her skills to make this a functioning and productive organization.

DATA ANALYSIS

Since the denial of the RI Supreme Court stay December 15, 2006, PERA has received 14 new complaints. PERA continues to address previous complaints of 2005 and 2006 in now interviewing police officers identified in those complaints. The process still remains slow, working through the case log and coordinating interviews. Six cases have been closed administratively or no probable cause since January 2007



	2007
Cases Open (14)	
Category 1 – Inappropriate Language/Conduct	4
Category 2 – Harrassment	0
Category 3 – Discrimination/Racial Profiling	1
Category 4 - Theft	0
Category 5 - Excessive Use of Force	6
Category 6 – Other	3
Open and Pending Cases	41
Under Review-(2)	
Investigations/interviews/awaiting PPD activity (39)	
Closed – Administratively	2
Closed – No Probable Cause	4

PERA has opened fourteen new cases since November 21, 2006 to date, and have 41 open and pending cases, 2 under review and 39 awaiting investigations, interviews, and PPD activity, 2 closed administratively, and 4 with no probable cause.

TRENDS

PERA has addressed the initial slow process of acquiring Providence Police Department (PPD) data. PERA staff now obtains police records without the necessity of contacting the Internal Investigations and Inspection Unit, and Internal Affairs Bureau (IAB). However, beyond public record data it is still necessary to involve IAB to acquire such items as audio, video, booking data etc.

The second trend remains to be one of training. PERA still see complaints bolstered by interviews of police officers that they do not receive specialized training to deal with individuals who suffer a mental illness due to alcohol, drugs, or other disease. These situations where trained individuals could agree a situation usually escalate to an arrest for disorderly conduct.

Thirdly complainants are still not aware of the police officers' names and in some instances badge numbers. A policy of identification and reasons for stop or arrest should be adopted.

COMMUNITY OUTREACH

Mr. Deary sits on the Minority Outreach Committees to the Urban League Civil Rights Roundtable and RI Chiefs of Police.

During the past legislative session a compromise was being sought between the community and the Chiefs as to language acceptable to both for a law to continue data collection statistics with relevance to motor vehicle stops (Title 31 Chapter 21.2).

The community came to the table with a list of suggested areas to include and the Chiefs came with reasons why they were not good ideas. Discussions carried on throughout the spring, summer and fall months with several points of contention. Then in early December the RI ACLU presented its bill to the statehouse which included many of the areas of discussion that were on the table and some off. The Chiefs immediately responded by stating they would seek to present their own bill, which they did. Both bills were referred back to committee with the suggestion that a compromise be worked out between the ACLU and RICPA versions.

The RICPA has agreed to return to the table for discussion. On July 2, 2007 a meeting was held with representatives of the RICPA and Minority Outreach members and an agreement was reached to develop a bill within the next six months to present to the State House. This Racial Profiling bill is being closely followed by PERA because it will greatly impact the community. Some of the goals and outcomes being stressed by the Roundtable are a statewide system to receive complaints of citizens and a "system independent of the police departments external review model like PERA.

PERA has advertised on the RIPTA buses since March 2007, has given palm cards out to the community and addressed community groups on a personal basis to advertise PERA. The Outreach Committee continues to meet and discuss new ways to reach the community such as TV ads, radio and newspaper advertising.

INFORMATION TECHNOLOGY

Based on the victory of PERA over the Providence FOP in November 2006 the upgrade of PERA office equipment was undertaken.

First an office copier, printer, fax and e-mail device was purchased capable of handling all PERA's business as can be seen by the PERA Annual Report of 2006 which was totally prepared, printed and bound by PERA staff; an estimated savings in the thousands of dollars.

Research was conducted by staff as to the best management software program available to handle PERA casework. A decision was reached to purchase IAProfessional from CI Technologies, the same system being utilized by hundreds of police departments including the Providence Police Department. Initial attempts to purchase the software were considered somewhat high at \$10,000, but after negotiations by staff the program was purchased for \$2,500. Also with PERA staff connections with Boston Massachusetts Police Department we were able to receive initial up front training for free.

A new server was purchased to handle the IAPRO software. The installation process is still continuing. The process has been slowed down by necessary purchases for additional support supplies, and scheduling difficulties with the IT department of the city. PERA's office network had to be redesigned.

RESOURCES

Initially when PERA was founded PERA was authorized 2 investigators. Due to the uncooperative efforts of the Providence Police Department (PPD) and the subsequent lawsuit the second investigator position were never needed to be filled. PERA returned thousands of budget dollars to the city during this time 2002-2006.

Now with PERA moving forward two investigators are desperately needed. Right now the only investigators are desperately needed. Right now the only investigator is also doing all the IT work. The second investigator would allow the Executive Director more time to address other avenues PERA should be involved in such as meetings with council members, community meetings with other organizations, dialogue with community leaders, school leaders etc.

Another item PERA is trying to address is we had had two situations where representatives of sections of the city have claimed they have complaints but they are afraid to come to PERA offices. PERA is attempting to address this and possibly have meetings in community centers or the like to meet with these people.

LAWSUIT

PERA filed an objection and memorandum in opposition to the FOP motion for injunction pending the FOP appeal to the RI Supreme Court on January 5, 2007 (see Appendix A).

The RI Supreme Court denied the plaintiffs stay on January 10, 2007 (see Appendix B).

By advice of counsel on January 10, 2007 PERA can now proceed with investigations and order police officers in for interviews. Case investigations were begun immediately with all tolled cases.

IN THE SUPREME COURT OF THE STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

PROVIDENCE LODGE NO. 3,
FRATERNAL ORDER OF POLICE;
KEITH LAFAZIA; and
JOSEPH SARRASIN

vs.

PROVIDENCE EXTERNAL REVIEW
AUTHORITY; THE CITY OF PROVIDENCE;
and DAVID N. CICILLINE, in his capacity
as Mayor of the City of Providence

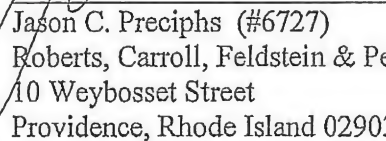
Case No. SU-06-0343

[P.C. 06-4859]

OBJECTION AND MEMORANDUM OF THE APPELLEES IN OPPOSITION
TO MOTION FOR INJUNCTION PENDING APPEAL

ON APPEAL FROM DECLARATORY JUDGMENT OF THE
PROVIDENCE SUPERIOR COURT

Appellees,
PROVIDENCE EXTERNAL REVIEW
AUTHORITY; THE CITY OF PROVIDENCE;
and DAVID N. CICILLINE,
in his capacity as Mayor of the
City of Providence,
By their Counsel,


Jason C. Preciphs (#6727)
Roberts, Carroll, Feldstein & Peirce
10 Weybosset Street
Providence, Rhode Island 02903
(401) 521-7000 (P); (401) 521-1328 (F)

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT

PROVIDENCE LODGE NO. 3, :
FRATERNAL ORDER OF POLICE; :
KEITH LAFAZIA; and :
JOSEPH SARRASIN : Case No. SU-06-0343

vs. : [P.C. 06-4859]

PROVIDENCE EXTERNAL REVIEW :
AUTHORITY; THE CITY OF PROVIDENCE; :
and DAVID N. CICILLINE, in his capacity :
as Mayor of the City of Providence :

MEMORANDUM OF THE APPELLEES IN OPPOSITION
TO MOTION FOR INJUNCTION PENDING APPEAL

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R.I. Gen. Laws § 42-28.6-4	5, 6
R.I. Gen. Laws § 42-28.6-5	6
R.I. Gen. Laws § 42-28.6-6	6
R.I. Gen. Laws § 42-28.6-115, 6

ORDINANCES – Providence Code of Ordinances

Ord. § 18½-2	2-5
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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT

PROVIDENCE LODGE NO. 3,	:	
FRATERNAL ORDER OF POLICE;	:	
KEITH LAFAZIA; and	:	
JOSEPH SARRASIN	:	Case No. SU-06-0343
	:	
vs.	:	[P.C. 06-4859]
	:	
PROVIDENCE EXTERNAL REVIEW	:	
AUTHORITY; THE CITY OF PROVIDENCE;	:	
and DAVID N. CICILLINE, in his capacity	:	
as Mayor of the City of Providence	:	

MEMORANDUM OF THE APPELLEES IN OPPOSITION
TO MOTION FOR INJUNCTION PENDING APPEAL

The Appellees (Defendants below) hereby submit the this Memorandum of law in support of their Objection to the Motion of the Appellants seeking an Order of this Court enjoining the Providence External Review Authority from continuing to operate pending this Court's review of a Declaratory Judgment sustaining the validity of the PERA enabling ordinance. As set forth herein, because: (1) Appellants are not likely to succeed on the merits; (2) the appellants' will suffer no irreparable harm without the requested injunctive relief; and (3) the balance of the equities, including the possible hardships to each party and, particularly, to the public interest, weigh in PERA's favor, Appellees respectfully request the Court to deny the Appellants' motion.

INTRODUCTION

The Providence External Review Authority, ("PERA"), was established in 2002 by Providence City Ordinance No. 614 (Chapter 2002-39) to provide a system of civilian oversight for the Providence Police Department. PERA has the mission and the authority to investigate and conduct hearings concerning allegations of misconduct on the part of sworn officers of the

Providence Police Department. In addition, PERA has committed itself to public education regarding police procedures and constitutional rights.

Appellants, two officers who have been the subject of a civilian grievance and the Fraternal Order of Police, Lodge No. 3, served their Complaint for Declaratory Judgment and Injunctive Relief on September 19, 2006. Subsequently, the parties reached agreement as to the facts in controversy and submitted legal memoranda for the Superior Court's consideration.

In their memoranda submitted below, Appellants, (the "Officers"), sought to have the PERA Ordinance invalidated based on an assertion that the ordinance violates the Law Enforcement Officers' Bill of Rights, R.I. Gen. Laws §§ 42-28.6-1 *et seq.* ("LEOBOR"), while also arguing that the City's legislation amounted to an *ultra vires* act that runs afoul of Providence's Home Rule Charter.

In response, Appellees (collectively, "PERA") asserted that LEOBOR, based upon clear statutory language, applies solely to investigations and activities undertaken by a "law enforcement agency"¹ and that as a "preliminary proceeding not resulting directly in disciplinary action," the PERA process does "not have to meet the requirements of the LEOBOR." *City of East Providence v. McLaughlin*, 593 A.2d 1345, 1351 (R.I. 1991).

Hearing on the parties' arguments went forward on November 3, 2006, based upon an agreed record submitted at the hearing to the Superior Court. The court, Mr. Justice Fortunato presiding, rejected the Officers' attempt to invalidate the PERA Ordinance, specifically holding that: (1) PERA could continue to conduct investigations and hearings of alleged police misconduct and, if sustained, PERA could make such recommendations as it deemed appropriate to the Chief of Police; (2) the PERA Ordinance shall not be construed or interpreted as

¹ R.I. Gen. Laws § 42-28.6-2.

authorizing PERA to directly impose discipline on any law enforcement officer under any circumstances; and (3) the ordinance should not be construed as authorizing the police chief to impose any discipline without affording the law enforcement officer(s) involved the full protections set forth in LEOBOR.

This appeal followed the entry of a Declaratory Judgment in the defendants' favor on November 15, 2006. The issue presently *sub judice* is whether this Court should enjoin PERA from continuing proceed and operate as it has since opening its doors to the public on June 24, 2005.² In their motion, the Officers assert that a Maryland case demonstrates their likelihood of success on the merits and that injunctive relief is appropriate because police officers will suffer irreparable harm if interviewed by civilians. As will be demonstrated below, both assertions lack merit and, therefore, this Court should deny the present motion.

BACKGROUND

The Providence Code of Ordinances, § 18½-2 (the "PERA Ordinance"), mandates, "The authority shall review all allegations of misconduct on the part of sworn officers of the city police department, shall investigate the same, conduct hearings and make findings of fact with respect to those allegations.... Investigators hired by the authority shall be *civilians* who have appropriate prior experience or training." Ord. § 18½-2(a) (emphasis added).

PERA is authorized to receive complaints alleging misconduct by police officers including, but not limited to use of excessive force, inappropriate language or conduct, harassment, theft, and discrimination. Ord. § 18½-2(b). In addition, PERA "shall conduct such

² According to the 2006 Annual Report of the Providence External Review Authority, since opening its doors to the public, PERA has received twenty-six (26) separate civilian complaints of misconduct from the public. In 2005, four (4) complaints were referred for active investigation and notification of the complaints delivered to the Providence Police Department Office of Internal Affairs. The remaining complaints are in various stages of development.

outreach activities as necessary to inform the public of the authority and its practices. Any outreach shall be conducted with sensitivity to the diversity of languages and cultures present in the city.” Ord. § 18½-2(j).

Within thirty (30) days of the date on which a complaint is filed, PERA’s executive director reviews the complaint and recommends to the authority: (1) the complaint be dismissed; (2) the complaint be forwarded to mediation; or (3) the complaint be transmitted for full investigation. Ord. § 18½-2(l). PERA also provides an informal mediation process to resolve those complaints of a more minor nature. Ord. § 18½-2(n).

Should it be determined that a full investigation is warranted, the complaint is transmitted to a civilian authority investigator. Ord. § 18½-2(o). Upon completion of the investigation, the executive director may either dismiss the complaint or forward it to full hearing. Ord. § 18½-2(p).

In the event of full hearing, PERA randomly selects a five (5) person panel from its members to consider the matter. *Id.* The panel is required to make all reasonable efforts to complete evidentiary hearings and render a written decision within sixty (60) days of the completion of the investigation. In those instances in which the complainant is otherwise unrepresented by counsel, the authority legal counsel presents evidence to the panel on behalf of the complainant. The police officer may be represented by counsel and union representatives, may present evidence and may conduct cross-examination of witnesses. *Id.*

Within thirty (30) days of the completion of an evidentiary hearing, the hearing panel issues a written report containing findings of fact, a determination of whether or not the complaint has been sustained by a preponderance of the evidence, if applicable, the level of violation described in a disciplinary matrix developed by PERA and the Chief of Police, and a

“recommendation” of discipline, if any. Ord., § 18½-2(s). When PERA concludes that the complaint is sustained by the evidence presented, it submits its “recommendation” to the Chief of Police. Ordinance, § 18½-2(s). If, and only if, the Chief concurs with the “recommendation” and sustains the complaint, he/she may impose discipline in accordance with the disciplinary matrix developed by PERA and the Chief. *Id.* In any case, the Chief of Police is obligated to provide PERA, the Mayor and the City Council with a written explanation of the reasons for his/her decision. *Id.*

In contrast, “The [LEOBOR] enacted in 1976, is the exclusive remedy for permanently appointed law-enforcement officers who are under investigation *by a law-enforcement agency* for any reason that could lead to disciplinary action, demotion, or dismissal.” *McLaughlin*, 593 A.2d at 1348 (R.I. 1991) (citing *Lynch v. King*, 120 R.I. 868, 870 n. 1, 391 A.2d 117, 119 n. 1 (1978))(emphasis added). Under the LEOBOR, any law enforcement officer facing charges that may result in punitive action may request a hearing before a committee comprised of three (3) active law enforcement officers. R.I. Gen. Laws §§ 42-28.6-1 and 42-28.6-4. This committee has broad discretion to sustain, modify, or reverse the charges. *See* § 42-28.6-11; *see also Culhane v. Denisewich*, 689 A.2d 1062, 1064-65 (R.I. 1997)(citing *State Dep’t of Env’tl. Mgmt. v. Dutra*, 401 A.2d 1288 (R.I. 1978) (citations omitted)). As the Superior Court appropriately determined, as a matter of law, PERA, a civilian review board, is not “a law enforcement agency” and, therefore, LEOBOR neither applies to any of its activities nor preempts its actions.

ARGUMENT

- I. Appellants have demonstrated no reasonable likelihood of success on the merits.
 - a. By its plain, ordinary terms, the LEOBOR only applies to investigations by a “law enforcement agency”, not to a civilian review board.

The requirements of LEOBOR with respect to the conduct of a *law enforcement agency* conducting an investigation of a law enforcement officer are set forth in R.I. Gen. Laws § 42-28.6-2 (“Conduct of investigation”). As the plain language of the statute specifies, LEOBOR applies *only* to instances where an officer is “under investigation or subjected to interrogation by a *law enforcement agency*.” *Id* (emphasis added).

Specifically, § 42-28.6-2 of the Act provides:

Whenever a law enforcement officer is under investigation or subjected to interrogation *by a law enforcement agency*, for a non-criminal matter which could lead to disciplinary action, demotion, or dismissal, the investigation or interrogation shall be conducted under the following conditions (Emphasis added.)

In like fashion, literally every single section of the LEOBOR restates and confirms that the Act was intended to apply solely to investigations undertaken by a “law enforcement agency.”³

The principles by which this statute must be construed are oft-repeated by this Court.

“When charged with the duty of statutory construction, one must read the language so as to effectuate the legislative intent behind its enactment.” *Gilbane Co. v. Poulas*, 576 A.2d 1195, 1196 (R.I. 1990). “In construing a statute, [a] court must give effect to all parts of the statute, if reasonably possible, in keeping with its declared purpose. Additionally, the words used must be

³ See, e.g., R.I. Gen Laws §§ 42-28.6-4 (“Right to hearing – Notice request for hearing – Selection of hearing committee”) (“the law enforcement agency shall give notice to the law enforcement officer”); § 42-28.6-5(d) (“Conduct of hearing”) (“the law enforcement officer shall provide to the charging law enforcement agency a list of all witnesses”); § 42-28.6-8 (“Witness fees”) (“Witness fees, mileage, and the actual expenses necessarily incurred in securing attendance of witnesses and their testimony shall be itemized, and shall be paid by the law enforcement agency if the officer is ultimately found innocent.”); § 42-28.6-6(c) (“Evidence at hearing – Hearing record”) (“All proceedings before the hearing committee shall be recorded by stenographic record, the expense of which shall be borne by the charging law enforcement agency”); § 42-28.6-11(c) (“Decisions of hearing committee”) (“In any proceeding under this chapter, it shall be the burden of the charging law enforcement agency to prove, by a fair preponderance of the evidence, that the law enforcement officer is guilty of the offense(s) or violation(s) of which he or she is accused.”) (emphases added).

given their ordinary and customary meaning unless a contrary intention appears on the face of the statute. If the language of a statute is plain and unambiguous and expresses a single, definite, and sensible meaning, that meaning is presumed to be the Legislature's intended meaning and the statute must be interpreted literally." *Rhode Island Chamber of Commerce v. Hackett*, 411 A.2d 300, 303 (R.I. 1980).

Here, the plain, ordinary and customary meaning of the words chosen by the Assembly compel the conclusion that the LEOBOR was not intended to apply to civilian review panels or to any other investigative body or process not instituted by a "law enforcement agency." The language of LEOBOR's enabling statute is plain, unambiguous and expresses a single, definite and sensible meaning: the constraints of the LEOBOR shall apply: "[w]henever a law enforcement officer is under investigation or subjected to interrogation *by a law enforcement agency....*" R.I. Gen. Laws § 42-28.6-2 (emphasis added). The Court should, therefore, presume the Assembly intended these words to be given their plain, literal and common meaning. Hence PERA, as a civilian review body acting independent from any law enforcement agency, is simply not subject to the procedural and substantive constraints of the LEOBOR.

Had the General Assembly intended, as the Officers allege, to make LEOBOR the exclusive avenue by which the conduct of police officers is to be assessed and evaluated by *any* person or entity, even by civilian authorities, the Assembly could have clearly expressed such intent by eliminating the "law enforcement agency" limitation. The fact that the Assembly repeatedly and consistently limited the scope of the LEOBOR to investigations and proceedings of law enforcement agencies compels the conclusion the Plaintiffs misapprehend the reach of the Act.

The officers continue to assert that this Court's declarations that LEOBOR "represents the entire body of *rights* the Legislature intended to apply to police officers in this type of context," *Town of North Kingstown v. Local 473*, 819 A.2d 1274, 1276 (R.I. 2002), and that "the Bill of Rights [is] the only source of *remedies* available to officers being interrogated", *id.* (emphases added), indicates that PERA is preempted. However, a clear reading of the Court's language indicates that it means exactly what it says: if the LEOBOR and, e.g., a collective bargaining agreement conflict, LEOBOR prevails as the only source of rights and/or remedies available to an officer under discipline by a law enforcement agency. *See, e.g., City of Hagerstown v. Moats*, 568 A.2d 1181, 1185 (Md.App. 1990) (holding that Maryland's LEOBOR could not be superseded by a collective bargaining agreement).

b. This Court has already held that civilian municipal review of police activities does not fall within the ambit of the LEOBOR.

In fact, this Court has already addressed the precise question presented by this appeal: whether the LEOBOR applies to or preempts a municipal civilian investigation of police misconduct. *McLaughlin*, 593 A.2d at 1345. The court specifically held that it does not. *Id.*

In *McLaughlin*, the investigation into an officer's alleged misconduct began in March 1989 when the East Providence Minority Political Caucus informed the city council of alleged racial remarks made by an officer and requested that the council investigate the matter. Thereafter, the City's affirmative-action officer, Onna Williams, conducted a preliminary investigation into the allegations. *Id.*

In September 1989, the affirmative-action officer filed a report with the city manager, which report stated that "the evidence shows an overwhelming preponderance of offensive behavior that is continuous and flourishing." Overall, her report, based upon extensive

investigation, concluded that the officer had displayed conduct unbecoming an officer on numerous occasions and recommended that he be terminated. *Id.*

After the city's personnel director concurred with her findings, Ms. Williams then submitted a formal complaint to the city's police department, citing the numerous occurrences set forth in her report. The acting chief of police commenced an internal investigation and, eventually, a hearing was held in accordance with the LEOBOR. *Id.*

In determining whether the affirmative-action officer's actions violated the officer's rights under the LEOBOR, this Court explained:

[W]e note the [hearing] committee's conclusion that the city failed to handle the matter as prescribed by the Law Enforcement Officers' Bill of Rights. Specifically, the committee stated that "the matter should have been investigated in-house by a member of the East Providence Police Department and from day one, the accused . . . should have been advised that he was under investigation."

We find, as the committee did, that the matter was handled appropriately from the time of [the chief's] investigation. Prior to that time Onna Williams' investigation was conducted merely to explore the need for an official investigation. *As a preliminary proceeding not resulting directly in disciplinary action, Williams' investigation did not have to meet the requirements of the Law Enforcement Officers' Bill of Rights.* Rather her investigation laid the groundwork for her swearing out a formal complaint, which led to the official investigation. Therefore, we find that the city did not violate the statutory guidelines prior to [the chief's] official involvement. The committee erred in concluding otherwise. *Id. (emphasis added).*

Consistent with the holding in *McLaughlin*, this Court has subsequently explained:

On several occasions [we] ha[ve] noted that if a *departmental investigation* of a police officer's conduct *could* result in the imposition of a disciplinary action, such as a demotion, transfer, dismissal, loss of pay, or similar action, to a permanently employed law enforcement officer, such officer is entitled to a hearing on any charge arising from the investigation before a "hearing committee" composed of three active Rhode Island law enforcement officers. *Zincone v. Mancuso*, 523 A.2d 1222, 1224 (R.I. 1987)(emphasis added).

As the trial court recognized, there is, indeed, a distinction between East Providence City Affirmative Action Officer Onna William's ad hoc investigation, constrained by no set rules or procedures, and the PERA process, governed by a formal process set forth in PERA's administrative rules. The trial court framed its interpretation of *McLaughlin* as follows:

I think the inference to be drawn from that is that she had no rules, regulations or guidelines in written form to guide her as she went about doing this. And yet, the Supreme Court said that is all right because she wasn't functioning as a law enforcement agency and she wasn't meting out discipline. (Tr. at 9-10.)

Later, in explaining the basis for its Order, the trial court stated:

The affirmative action officer of the city, apparently with no rules in place to guide her, but nonetheless recognizing that the use of racial epithets, racial slurs and other improper conduct by a particular police officer should perhaps be further investigated if proved to be true, this affirmative action office was designated to investigate the matter and did so, and then made her recommendation to the police chief that the officer be disciplined. The police chief then started to move toward disciplining the officer, at which point the Bill of Rights were triggered for the protection of the officer. (Tr. at 31.)

Based upon this Court's guidance in *McLaughlin*, conjoined with the plain language of the LEOBOR, Appellants fail to show a likelihood of success.

Yet, the Officers rest their assertion that a likelihood exists that this Court will rule in their favor by citing to and relying upon *Abbott v. Administrative Hearing Board, Prince George's County*, 366 A.2d 756, 759-60 (Md.Ct.Spec.App. 1975). According to the Officers, in *Abbott*, "The only appellate court to rule on [whether a civilian review board is preempted by LEOBOR] in a similar LEOBOR context held that the Maryland LEOBOR preempted the local ordinance." (Appellants' Mem. at 10.) To the contrary, neither the *Abbott* court nor any other Maryland Court has determined that the state's LEOBOR preempts a civilian review board.

Rather, this Court may take notice of the existence of the Baltimore Civilian Review Board ("CRB"), which procedurally, effectively parallels PERA. ⁴

Abbott arose when a law enforcement officer, employed by a county government, was disciplined for the improper discharge of a firearm. *Id.* at 758. The officer proceeded to appeal the discipline. However, contrary to the procedure set forth in Maryland's LEOBOR which provided a single path for redress, namely, review by the state's circuit court, the officer in *Abbott* attempted to appeal his discipline to the county personnel board, in addition to following the LEOBOR procedure. In proceeding in this manner, the law enforcement officer argued that, as a county employee, regardless of the supposed exclusivity of Maryland's LEOBOR as a remedy, he was, nonetheless, entitled to utilize the county charter's administrative appellate procedure. *Id.*

Faced with the officer's attempt to utilize duplicative avenues of review, the county filed a motion to stay his administrative appeal, contending that under Maryland's LEOBOR, exclusive jurisdiction to review a decision of the hearing board was vested in the circuit court. *Id.* The circuit court, sitting as the venue for consideration of the county's motion, stayed the officer's administrative appeal, holding that exclusive jurisdiction to hear the appeal was vested

⁴ Making no adjustment's to the Maryland LEOBR, Maryland's legislature established the CRB as an independent agency through which complaints lodged by members of the public regarding abusive language, harassment or excessive force by police officers shall be processed, investigated and evaluated. Publ. Local Laws of Md., Art. 4, §16-42. The CRB, which is not a unit or agency of the Baltimore Police Department, may conduct its own investigation and take testimony from witnesses. *Id.*, §16-46(a)(2). At the end of the investigation, the CRB reviews the an internal affairs report, its own report and submits to the Police Commissioner its findings and a recommendation (1) that the complaint be sustained, in which case the CRB recommends the appropriate disciplinary action against the officer; (2) that the complaint not be sustained; (3) that the officer be exonerated; or (4) that there be further investigation by internal affairs. *Id.*, §16-46(c), (d). The final decision as to the disposition of the complaint is made by the Police Commissioner after a review of the CRB's findings and recommendation. *Id.*, § 16-48(a).

in accordance with Maryland's LEOBOR: a state statute preempting the county's procedure.

On review, the Court of Special Appeals, in the decision cited by the Appellants herein, upheld the circuit court's ruling. *Id.*

Contrary to the Appellants' representations, *Abbott* never addressed the issue of whether a civilian review board can exist and, therefore, cannot provide legal support for the Officers' proposition that LEOBOR would preempt such a board. More significantly, the Officers have not explained how, if *Abbott* is, indeed to be read in the sweeping fashion they assert, the CRB exists in Maryland with no special accommodation in Maryland's LEOBOR, aside from the obvious and plain limitation set forth the state's comparable LEOBOR. As in Rhode Island, Maryland's LEOBOR only applies during, "The investigation or interrogation by a law enforcement agency of a law enforcement officer for a reason that may lead to disciplinary action, demotion, or dismissal shall be conducted in accordance with this section." Md. Public Safety § 3-104(a). *See also Prince George's County v. State Commission on Human Relations*, 392 A.2d 105, 112 (Md.App. 1978) *vacated on other grounds*, 401 A.2d 661 (Md. 1979)(holding that even though the State Commission on Human Relations performs functions which enforce the laws against discrimination, the Commission is not a "law-enforcement agency" either as that term is generally defined or for purposes of Maryland's LEOBR because, *inter alia*, "A law-enforcement agency generally has the power to make arrests [and n]o such authority is vested in the Commission.").

The narrow issue addressed in *Abbott* was one of which fork in the road was appropriate in the face of two conflicting avenues to obtain review of a disciplinary action: the avenue promulgated by the state legislature as an exclusive remedy or another, pre-existing path paved

by a local government. Only by torture may the case be interpreted as sweepingly as the Officers posit.

In fact, PERA is not the first comprehensive arrangement for the civilian review of police activities in the City of Providence where a claim of conflict with the LEOBOR has been raised. The District of Rhode Island and, subsequently, the First Circuit Court of Appeals have already addressed the subject matter overlap between a municipal police review board intended to protect the rights of aggrieved citizens and the LEOBOR, finding that the two may be reconciled to co-exist. See *Coalition of Black Leadership v. Cianci*, 570 F.2d 12 (1st Cir. 1978). PERA has been crafted so as to do just that, coexist with LEOBOR; the civilian review process may occur alone or in addition to the proceedings of the law enforcement agency.

□ **Background: *Coalition of Black Leadership vs. Cianci***

In 1971, black residents of Providence filed a federal class action suit alleging various civil rights violations committed by members of the police department. After trial of the matter, a consent decree entered on March 27, 1973, (the "Consent Decree"), providing a procedure through which a civilian complaint against an officer could be filed, investigated and resolved. *Coalition of Black Leadership* 570 F.2d at 13.

In relevant portions, the Consent Decree provided for the investigation of each civilian complaint by the Bureau of Personnel and, thereafter, preparation of a written report regarding the investigation and a hearing on each complaint where, "the investigating officer [from the Law Enforcement Agency] and any officers complained against shall attend." (Consent Decree at 3.) The hearing proceeded before a hearing officer who, ultimately, was empowered to make a finding of either "guilty" or "not guilty", which finding was transmitted to the Chief of Police, who was afforded discretion to either approve or reject the finding. (Consent Decree at 3-4.) If

rejected, under the Consent Decree, the Chief could, in his/her discretion, submit charges against the officer in accordance with existing departmental disciplinary procedures. In any event, the Chief's action on the hearing decision was noted in the officer's personnel file and all parties were notified of the action. Pursuant to the Consent Decree, records of hearings held were to be maintained for two (2) years from the original hearing date and are available to the parties to the complaint or their representatives. (Consent Decree at 4.)

□ "Coalition I"

Approximately three years after implementation of the Consent Decree in 1973, the General Assembly enacted the LEOBOR, prompting the Providence police officers to move for relief from the Consent Decree. See *Coalition of Black Leadership v. Cianci*, 570 F.2d 12 (1st Cir. 1978) ("*Coalition I*").

Coalition I arose after the City and the Fraternal Order of Police of the City of Providence moved for relief from judgment in the underlying discrimination action. *Id.* at 13. The District Court treated this action as a motion to vacate the Consent Decree, denied the motion, and ordered the parties to negotiate modifications to the decree to reconcile the rights afforded under the LEOBOR with the plaintiffs' rights to be free from "racially discriminatory conduct." *Id.* at 13.

On appeal, the officers pressed, as one of its two arguments, that equity required the court to vacate the decree because of changes in the facts of the case due to LEOBOR's promulgation. *Id.* at 13-14. In support of this argument, the officers asserted that the procedures of LEOBOR would make the provisions of the consent decree unnecessary and, furthermore, that continued application of the decree would "result in unfairness since providence police officers would be

subject to different regulations than would the police officers in other parts of Rhode Island.” *Id.* at 14.

Ultimately, however, the First Circuit affirmed the District Court’s ruling, rejecting both arguments. In so holding, the Court explained:

The consent decree at least in part was designed to protect the rights of those citizens who felt themselves to be aggrieved by unconstitutional police misconduct. The purpose of the new state legislation [the LEOBOR] was to protect police officers from any impairment of their rights when their conduct is questioned. While there is obvious subject matter overlap between the decree and the legislation, it is also obvious that neither was developed to meet these dual and partially inconsistent purposes. *Id.* at 14.⁵

Here, the situation with PERA requires the same conclusion. PERA flows directly from *Coalition I*. However, adopting the court’s pronouncement that a civilian review procedure can co-exist with LEOBAR, PERA has been specifically crafted to do so while protecting the rights of aggrieved citizens. Again, LEOBOR is merely intended to protect rights of the officer(s)

- c. **Because the General Assembly did not adopt LEOBOR as the exclusive remedy for police misconduct, the City is free to enact PERA and PERA is not preempted.**

The powers to the General Assembly with respect to home rule communities are set forth in § 4 of Article XIII:

Section 4. Powers of general assembly over cities and towns. - -
The general assembly shall have the power to act in relation to the property, affairs and government of any city or town by general laws which shall apply alike to all cities and towns, but which shall not affect the form of government of any city or town. The general assembly shall also have the power to act in relation to the property, affairs and government of a particular city or town

⁵ See also *Coalition of Black Leadership v. Cianci*, 480 F.Supp. 1340, 1341 (D.R.I. 1979) (“*Coalition II*”)(denying officers’ request to modify consent decree to require suspension of civilian complaint investigation where criminal charges arise out of the same incident).

provided that such legislative action shall become effective only upon approval by a majority of the qualified electors of the said city or town voting at a general or special election, except that in the case of acts involving the imposition of a tax or the expenditure of money by a town the same shall provide for the submission thereof to those electors in said town qualified to vote upon a proposition to impose a tax or for the expenditure of money. R.I. Const. Art. XIII, § 4.

Meanwhile, the Rhode Island Constitution, Section 2 of Article XIII, provides:

Local legislative powers. - - Every city and town shall have the power at any time to adopt a charter, amend its charter, enact and amend local laws relating to its property, affairs and government not inconsistent with this constitution and laws enacted by the general assembly in conformity with the powers reserved to the general assembly. R.I. Const. Art. XIII, § 2.

This Court has held that “[a] local ordinance or regulation may be preempted in two ways. First, a municipal ordinance is preempted if it conflicts with a state statute on the same subject. . . . Second, a municipal ordinance is preempted if the Legislature intended that its statutory scheme completely occupy the field of regulation on a particular subject.” *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1261 (R.I. 1999). Field preemption prohibits municipal regulations in an area in which the General Assembly has implemented a comprehensive regulatory framework, thereby indicating its intention to reserve that area solely for state control. *Amico’s Inc. v. Mattos*, 789 A.2d 899 (R.I. 2002). In *Amico’s Inc.*, the Court explained that:

The issue of preemption has appeared in case after case in which we have reviewed a municipality’s authority under home rule. The dueling issues of local authority and state preeminence often intersect because home rule requires an analysis of whether the issue is of local or statewide concern, whereas preemption requires an analysis of whether the issue is implicitly reserved within the state’s sole domain. 789 A.2d at 908.

Here, the first method of preemption described in *Thornton-Whitehouse* is not relevant because LEOBAR does not address “the same subject” as civilian review and, in any case, there is no conflict between the two. PERA was designed to protect the rights of those citizens who felt themselves to be aggrieved by unconstitutional police misconduct. On the other hand, the purpose of LEOBOR is to protect police officers from any impairment of their rights when their conduct is questioned by a law enforcement agency.

Second, the Assembly did *not* draft the LEOBOR in a manner to support a conclusion the Assembly intended to completely occupy the field relating to review of law enforcement conduct. Rather, the Assembly carefully and repeatedly limited the reach of the LEOBOR to investigations and proceedings by a law enforcement agency.

Finally, this Court has already rejected any conclusion that the LEOBOR preempts a civilian review process. *McLaughlin*, 593 A.2d at 1351.

II. The appellants will suffer no irreparable injury from a mere recommendation by PERA.

The plain language of the PERA Ordinance explicitly provides that the final outcome of the PERA process is a *recommendation* to the Chief of Police. Ordinance § 18½-2(s). The codified language of the Ordinance plainly states that, if the PERA hearing panel determines the evidence supports the complaint, it shall submit “a recommendation of discipline” to the Chief of Police. Moreover, PERA permits the officers to invoke their rights against self-incrimination under the Fifth Amendment. Therefore, no irreparable injury would befall the Officers from continuation of PERA’s work.

An injunction is “an extraordinary remedy.” *Brown v. Amaral*, 460 A.2d 7, 10 (R.I. 1983). In order to obtain injunctive relief, one factor for the Court’s consideration is, “whether the moving party ... (2) will suffer irreparable harm without the requested injunctive relief...”

Fund for Community Progress v. United Way, 695 A.2d 517, 521 (R.I. 1997). "Such irreparable injury must be either presently threatened or imminent. Injuries which are prospective in nature, or which might not occur, cannot form the basis for injunctive relief." *In re State Employees' Union*, 578 A.2d 919, 925 (R.I. 1991)(citing *R.I. Turnpike & Bridge Authority v. Cohen*, 433 A.2d 179, 182 (R.I. 1987)). "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C.Cir. 1958).

Here, under the ordinance and the Superior Court's Declaratory Judgment, PERA makes a recommendation and imposes no discipline upon any officer. The Officers only claim of an injury is the mere expenditure of time and energy which, based upon the procedural rights afforded to the Officers under PERA, is *de minimis*.

III. The Officers' assertion that "no substantial harm will come to other interested parties -- PERA and the City- because if PERA and the City prevail ... the only 'harm' will have been a delay in the PERA proceedings", fails to account for the public interest and the interest of the three dozen individuals whose complaints are before PERA.

Again, to assess the propriety of injunctive relief, the Court:

should determine whether the moving party (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo. *Fund for Community Progress*, 695 A.2d at 521; see also *Iggy's Doughboys, Inc. v. Giroux*, 729 A.2d 701, 705 (R.I. 1999).

The factors are balanced and, "In connection with any such balancing, the court is obliged to consider, as an integral factor, the public interest." *In re State Employees' Union*, 587 A.2d at 925.

Here, the Officers focus myopically on the effect of a "stay" upon the City and PERA. In so focusing, the Officers ignore the public interest and, particularly, the interests of the individuals whose complaints remain pending before PERA. Here, the interests of the three dozen individuals, one of whom is the individual whose complaint prompted this action, must be taken into account.

Moreover, PERA serves the public at large: not merely those individuals who reside in Providence but, also, those individuals who step within its boundaries at any given time. PERA's doors have been open to serve the public, again, since June of 2005. The cursory paragraph devoted to this factor in the Appellants' moving papers shows a disregard for this substantial factor that weighs in PERA's favor. PERA's staff and the individual complainants, should PERA be enjoined from proceeding according to its mandate, will have more than an extended waiting period. As the maxim reads, justice delayed is justice denied. Time would progress, memories would fade and the procedure of imposing an injunction would deter the public from utilizing this viable avenue of redress, foreclosing the rights of citizens who find themselves in Providence.

IV. Appellants assert that issues of first impression usually qualify for a stay. However, here, Appellants seek not a stay but, rather, injunctive relief and the cases they cite for this so-called "first impression" proposition clearly weigh *all* factors relevant to the determination of the propriety of injunctive relief, providing no automatic stay where an issue of first impression arises.

First, it should be noted that this is not a case of first impression as to whether a municipality, aside from a law enforcement agency, may investigate complaints against police

officers. See *McLaughlin*, *infra*. However, in support of their assertion that issues of first impression usually qualify for a stay, first, the Officers cite *Kirpat, Inc. v. Delaware Alcoholic Beverage Control Commission*, 741 A.2d 356, 358 (Del. 1998), in which a court granted a stay after noting that the moving party would suffer the loss of its business and that neither the opposing party nor the public at large would be substantially harmed by a stay. Clearly, a stay was adjudged appropriate in *Kirpat* based upon a balancing of all relevant factors, including an actual showing of imminent, irreparable harm and no showing of harm to the public.

In *Kirpat*, the appellant sought to stay an order of the trial court which affirmed a decision by the state Alcoholic Beverage Control Commission revoking the appellant's retail liquor license for selling alcohol to an underage individual. *Id.* at 357. Under Delaware law, a four pronged test for a stay required the reviewing court: (1) to make a preliminary assessment of likelihood of success on the merits of the appeal; (2) to assess whether the petitioner will suffer irreparable injury if the stay is not granted; (3) to assess whether any other interested party will suffer substantial harm if the stay is granted; and (4) to determine whether the public interest will be harmed if the stay is granted. *Id.* The lower court concluded that the appellant did not make a strong showing that it was likely to succeed on the merits of the appeal. However, the court proceeded to deny the appellant's motion for a stay based solely upon the first prong "without analyzing any of the three remaining factors of the four-prong test."

As the appellate court in *Kirpat* explained, "We find that a more reasonable approach to this issue is to balance all of the equities involved in this case together." *Id.* at 358. The court proceeded to weigh all of the four factors, noting that no harm would come to the commission or the public from a stay and, further, that the appellant would lose its business were a stay not granted. *Id.* at 358-59.

The situation at bar is dissimilar to *Kirpat*. To begin with, here, the irreparable harm asserted in *Kirpat*, namely, loss of a business, does not exist. As argued herein, the Officers will not be irreparably harmed by permitting PERA to continue receiving complaints, conducting its investigations and making mere recommendations. Moreover, where, in *Kirpat*, neither the opposing party nor the public at large would have been harmed by a stay, here, PERA and the public at large clearly would be harmed. As noted above, *Kirpat* involved merely the stay of an Order. Here, the Appellants seek injunctive relief in the first instance. Finally, in denying the Officers' request for injunctive relief, Judge Fortuanto did not, as the trial court in *Kirpat*, fail to balance the relevant factors.⁶

The Appellants proceed to cite additional cases for the proposition that cases of first impression usually result in the entry of a stay. However, upon further examination, the cited cases rest their determination that a stay is appropriate based upon the totality of the factors at issue. See, e.g. *Walsh v. Walsh*, 221 F.3d 204, 214 (1st Cir. 2000)("[Irish citizen father having fugitive status] has offered no reason particular to this case why the district court's stay [of order for the return of a child during the pendency of a Hague Convention on the Civil Aspects of International Child Abduction appeal] was an abuse of discretion."); *Pearce v. E.F. Hutton Groups, Inc.* 828 F.2d 826, 829 (D.C.App.Ct. 1978)(denying moving party's motion to vacate District Court's stay of its injunction pending appeal after analyzing four relevant factors and determining, "An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant.")(emphasis added);

⁶ "I see no harm coming to the plaintiffs, either the organizational plaintiff or the individual plaintiffs, if a stay is not granted...." (12/6/06 Tr. at 9); "I do think that there should be some . . . a strong showing that, among other things, the applicant . . . will prevail on the merits of the appeal." (12/6/06 Tr. at 6); "I think I can judicially not there is concern within the community . . . that some police officers... behave in a way that berates them.... Now, the City, to address this problem, has created this Board." (12/6/06 Tr. at 8.)

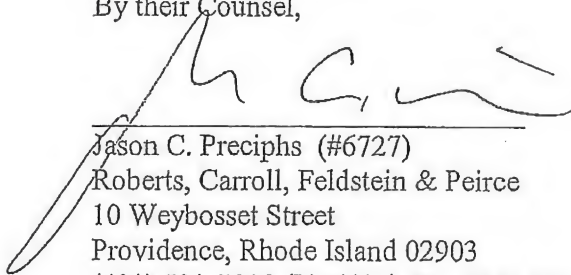
Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977)(declining to vacate order staying injunction after balancing all four relevant factors); *United States v. Fourteen Various Firearms*, 897 F.Supp. 271, 274 (E.D. Va. 1995)(weighing all four relevant factors and determining, *inter alia*, “[t]he claimants have failed to show that they will suffer any substantial harm”, and “there is a strong public concern in keeping weapons, which ultimately may be deemed contraband, off the streets.”).

Finally, the Appellants inaccurately assert that they seek to maintain the status quo. In fact, however, the status quo is a fully operational PERA that has never been injunctively constrained. Appellees contend that this status quo should, indeed, be maintained.

CONCLUSION

For the foregoing reasons, Appellees respectfully request the Most Honorable Court to deny Appellants’ Motion for an Order Staying/Enjoining the proceedings of the Providence External Review Authority pending resolution of this appeal.

Appellees,
PROVIDENCE EXTERNAL REVIEW
AUTHORITY; THE CITY OF PROVIDENCE; and
DAVID N. CICILLINE, in his capacity as Mayor of
the City of Providence
By their Counsel,



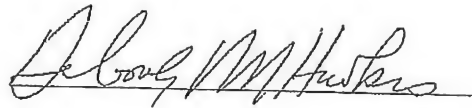
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Providence, Rhode Island 02903
(401) 521-7000 (P); (401) 521-1328 (F)

CERTIFICATION

I hereby certify that on the 5th day of January, 2007, a true and accurate copy of the within was mailed, postage prepaid, to:

Joseph J. Rodio, Esq.
Rodio & Ursillo, Ltd.
86 Weybosset St.
Providence, RI 02903

Lauren E. Jones.
Jones Associates
72 South Main Street
Providence, RI 02903-2907

A handwritten signature in cursive script, appearing to read "Debra M. Hester", written over a horizontal line.

JCP/1690-12/310604

1690-12

JAN 16 2007

Supreme Court

No. 06-343-A

Providence Lodge No. 3, Fraternal Order of :
Police; Keith LaFazia and Joseph Sarrasin :

v. :

Providence External Review Authority; The :
City of Providence; and David N. Cicilline, in :
his capacity as Mayor of the City of :
Providence :

ORDER

The plaintiffs' motion for an Order staying or enjoining proceedings before the defendant Providence External Review Authority pending plaintiffs' appeal in this case, as prayed, is denied.

Entered as an Order of this Court this 10th day of *January* 2007.

By Order,


Clerk

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